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APPENDIX

JUN 12 1971

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

[redacted]

PAUL M. BRANZBURG - - - - *Petitioner,*

versus

JOHN P. HAYES, Judge, Etc., Et Al.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petition for a Writ of Certiorari Filed February 23, 1971
Certiorari Granted May 3, 1971

WESTERFIELD-BONTE CO., INC., 819 W. KENTUCKY, LOUISVILLE, KY.

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Erratum

Page ii, line 10 and 11, should be corrected to re

Statutes:

Kentucky Revised Statutes, §421.100 14,

CHRONOLOGICAL LIST OF PLEADINGS, HEARINGS AND ORDERS IN RE RESPONDENT HAYES

November 25, 1969	Respondent ordered by the Judge of the Criminal Branch, Second Division, Jefferson Circuit Court, to answer questions posed by grand jury.
November 25, 1969	Petition for Temporary and Permanent Relief filed with Kentucky Court of Appeals.
November 25, 1969	Kentucky Court of Appeals Order of Temporary Prohibition.
November 27, 1970	Opinion of the Kentucky Court of Appeals denying permanent relief and dissenting opinion of Chief Justice Hill.
December 7, 1970	Motion to Reconsider filed with the Kentucky Court of Appeals.
January 22, 1971	Modified opinion and mandate from the Kentucky Court of Appeals denying permanent relief and dismissing petition.
January 22, 1971	Motion to Kentucky Court of Appeals for a stay of 90 days.
January 25, 1971	Order of Kentucky Court of Appeals denying Stay.

CHRONOLOGICAL LIST OF PLEADINGS, HEARINGS AND ORDERS IN RE RESPONDENT MEIGS

January 14, 1971	Subpoena issued for Petitioner to appear before the Franklin County, Kentucky, Grand Jury.
January 18, 1971	Motion by Petitioner to quash grand jury subpoena.
January 18, 1971	Motion to quash subpoena denied by Respondent Meigs.
January 18, 1971	Petition for Temporary and Permanent Relief filed with the Kentucky Court of Appeals.
January 22, 1971	Protective Order issued by Respondent Meigs.
January 22, 1971	Order and Opinion of Kentucky Court of Appeals denying prohibition and Mandatory Relief.
January 22, 1971	Motion to Kentucky Court of Appeals for a stay of 90 days and motion for temporary writ of prohibition.
January 25, 1971	Order of Kentucky Court of Appeals denying stay.

The Courier-Journal, Louisville, Ky.—Saturday Morning, November 15, 1969

Could Be a Pot of Gold

THE HASH THEY MAKE ISN'T TO EAT

By Paul M. Branzburg
Courier-Journal Staff Writer

Larry, a young Louisville hippie, wiped the sweat off his brow, looked about the stuffy little room and put another pot on a stove over which he had been laboring for hours.

For over a week, he has been proudly tending his pots and pans. But he also has paused frequently to peek out the door in search of "The Man" (police).

Larry and his partner, Jack, are engaged in a weird business that is a combination of capitalism, chemistry and criminality.

They are operating a makeshift laboratory in south-

Pictures on Page B 1.

central Louisville that may produce them enough hashish, or "hash", a concentrate of marijuana, to net them up to $5,000 for three weeks of work.

Larry and Jack were once run-of-the-mill dope dealers, but in the past few months they have expanded operations and become dope manufacturers.

On a sunny afternoon last week, Larry entered his "lab" and began another day of cooking hash. With long-handled pruning shears, he began chopping marijuana stems into a large tub.

"I don't know why I'm letting you do this story," he said quietly. "To make the narcs (narcotics detectives) mad, I guess. That's the main reason." However, Larry and his

partner asked for and received a promise that their names would be changed.

The room had once been a kitchen, but it now smelled like a stable. A bare lightbulb on the ceiling cast a pallid glow over the cracked pink walls, an old-fashioned gas stove, a green mattress on the floor and a pile of cheap broken furniture in the corner. A filthy sink was stacked with dirty dishes. The floor was covered with discarded marijuana that had already been processed.

'Partly an Ego Trip'

"The trouble we're having is finding the right base," Larry said, as he continued to chop stems. "The hash we've produced gets you stoned, but it doesn't smoke the same way as foreign hash. I tried to use incense as a base, but it gives too much of a sweet taste. In the Middle East they use camel manure, so I'm thinking of going out to the zoo and copping some camel manure."

"For me, making hash is partly an ego trip," he said. "To see how good I can make it. To see how close I can get it to foreign hash. We've gotten it to the right consistency, but not the right taste."

Larry is a tall, slender 21-year-old who has traveled over much of the world and whose parents live in a very comfortable home in the East End. He has been on Louisville's hip scene for about a year.

Jack is a long-haired 20-year-old who has been in Louisville two years. "I came down here when I was 18," he says, "and my sister was turning on, and so I slowly met the hip people."

Have 30 Pounds

Both deny they are manufacturing hash for the money, although they admit that it can be fantastically profitable.

Hashish is most commonly sold at about $7 to $10 per gram, and there are about 29 grams per ounce. Larry and Jack have about 30 pounds of marijuana—originally picked

in Kentland, Ind.—and that is enough to yield about five pounds of hashish.

When sold in bulk, hashish brings $800 to $1,000 per pound. Larry and Jack already have five buyers who want a pound apiece. So they should make $4,000 to $5,000 for three weeks of work.

At first glance, it appears that Larry and Jack make a great deal of money. Actually, if they are successful in manufacturing and selling five pounds of hashish, they will probably go out of business for a few months. They have only bothered to make hashish three times this year.

"If you have no status to live up to, you don't worry when you run out of bread (money)," says Jack. "It's nice to work and have nice things, but its too much of a hassle."

Larry poured rubbing alcohol into the tub of marijuana stems and put it on the stove to cook. Soon the room was full of the sick smell of gaseous alcohol. Larry opened the window and sat down on the mattress to avoid the fumes.

"Actually, this is a service to keep people away from heroin," he said, seriously. "Junk is like being dead. You can't eat, sleep or have sex. But hash is enlightening."

The dope duo have divided up business responsibilities. Larry manufactures. Jack is "vice president in charge of sales—or something like that."

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH, SECOND DIVISION
COMMONWEALTH OF KENTUCKY, COUNTY OF JEFFERSON

In Re: No. 141087

ORDER

AT A COURT HELD NOVEMBER 25, 1969.

This case being before the November Term of the Grand Jury, comes Edwin A. Schroering, Jr., Commonwealth's Attorney, and requests the Court to rule whether the witness, PAUL BRANZBURG, should be held in contempt of Court, under Rule 5.12, for failing to answer two questions propounded to him by the Grand Jury. Comes the Foreman of the Grand Jury, Mr. E. H. Speckman, Jr., and reads the questions, to-wit:

#1. On November 12, or 13, 1969, who was the person or persons you observed in possession of Marijuana, about which you wrote an article in the Courier-Journal on November 15, 1969?

#2. On November 12, or 13, 1969, who was the person or persons you observed compounding Marijuana, producing same to a compound known as Hashish?

Argument of the Commonwealth and the witness, Paul Branzburg by counsel, Mr. Edgar A. Zingman heard. Mr. Zingman argued that Rule 421.100 applies in this case and that the witness, Paul Branzburg, should not be required to answer the questions. The Commonwealth's argument that Rule 421.100 does not apply in this case heard. The Commonwealth requests that the Court direct the witness, Paul Branzburg, to answer the questions propounded to him by the Grand Jury. The Court being sufficiently advised, holds

that the witness shall answer. Ordered that this case be and is assigned to 9:30 A.M. Wednesday, November 26, 1969. Counsel, Mr. Zingman, enters his objection on the grounds pursuant to Rule 421.100 and the freedom of the Press under the First Amendment to the Constitution of the United States of America.

/s/ J. MILES POUND, JUDGE

IN THE

COURT OF APPEALS OF KENTUCKY

ORIGINAL NO. F-213-69

PAUL BRANZBURG - - - - PETITIONER

vs.

J. MILES POUND, Judge, Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County Courthouse, Louisville, Kentucky - - - - - - RESPONDENT

PETITION FOR TEMPORARY AND PERMANENT RESTRAINING ORDER AND WRIT OF MANDAMUS

Comes now Paul Branzburg, by counsel, pursuant to R.C.A. 1.420 and C.R. 81, and for his petition states as follows:

(1) The Respondent against whom relief is sought is the Honorable J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Division, Jefferson County Courthouse, Louisville, Kentucky.

(2) The facts entitling Petitioner to relief are:

(a) Petitioner is an individual employed by the Courier-Journal & Louisville Times Company, a Kentucky corporation.

(b) Petitioner's duties as a reporter require Petitioner to seek out and contact sources of news information, to then write stories based upon the facts he has observed and to have such stories published in the newspapers published by his employer in Jefferson County, Kentucky for distribution and sale in Jefferson County, Kentucky, throughout

the Commonwealth of Kentucky and in various places in the United States.

(c) In the November 15, 1969 issue of the Courier-Journal, there appeared a story written by Petitioner based upon information which he had acquired on or about November 12 or 13, 1969. A copy of the story is attached hereto and made a part of this petition.

(d) On November 25, 1969, the Petitioner was called before a grand jury sitting in Jefferson County, Kentucky and was examined concerning the events and matters set forth in the story attached hereto. During the course of that examination Petitioner was asked the following questions:

1. On November 12 and 13, 1969, who was the person or persons you observed in possession of marijuana of which you wrote an article in the Courier-Journal of November 15, 1969?
2. On November 12 and 13, 1969, who was the person or persons you observed in compounding and mixing marijuana reducing same to a compound known as hashish of which you wrote an article in the Courier-Journal of November 15, 1969?

(e) The Petitioner refused to answer each of said questions on the grounds of the privilege not to answer afforded to him by KRS 421.100 which provides as follows:

> 421.100 (1649d-1) Newspaper, radio or television broadcasting station personnel need not disclose source of information.
>
> No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly; or any committee thereof, or before

any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.

(f) Following upon this claim of privilege the Petitioner, the foreman of the grand jury and the Commonwealth's attorney appeared before the Respondent. The matter was presented to the Respondent. The undersigned counsel for the Petitioner advised the Respondent that the Petitioner was entitled not to answer the questions under the provisions of KRS 421.100 and under the provisions of the First and Fourteenth Amendments to the Constitution of the United States and Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky.

(g) After hearing counsel, the Respondent directed that the Petitioner should appear again before the grand jury and that the question should again be put to the Petitioner. He further announced that in the event that the grand jury shall report back to Respondent that the Petitioner had again refused to answer the questions, that Respondent would then pursue the provisions provided for dealing with contempts of court.

(h) The Respondent set 9:30 A.M., Wednesday, November 26, 1969, as the time for further proceedings in this matter.

(i) Following upon the announcement of the ruling of the Court the Petitioner again appeared before the grand jury and upon being posed the same questions again asserted his privilege against answering said questions and refused to answer said questions.

(3) The contempt action which will be against the Petitioner on November 26, 1969, is clearly violative of his rights and privileges as provided under KRS 421.100 and

under Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky and the First and Fourteenth Amendments of the Constitution of the United States of America. It is an interference with the exercise of freedom of the press and would permit courts to destroy that confidential relationship which is essential to a free press and which has been provided for by the Legislature of the Commonwealth of Kentucky.

(4) The nature of the relief sought:

(The Petitioner, by counsel, respectfully prays that a writ issue from this Court requiring that:

(a) The Respondent, the Honorable J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Division, Jefferson County Courthouse, Louisville, Kentucky, be restrained from proceeding against the Petitioner on November 26, 1969 or thereafter in the matter of contempt proceedings growing out of the exercise by the Petitioner under his privilege under KRS 421.100 and the Constitutions of the Commonwealth of Kentucky and of the United States of America.

(b) That the entire matter be set down for hearing at a time to be set by this Court for determination upon a permanent writ against the Respondent.

(c) All other necessary and proper relief to which the Petitioner shall appear entitled.

Respectfully submitted,

WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building
Louisville, Kentucky 40202
/s/ Edgar A. Zingman
/s/ Robert C. Ewald
Counsel for Petitioner

The affiant, Paul Branzburg, states that he has read the foregoing petition, and that the statements contained therein are true as he verily believes.

/s/ Paul Branzburg

(Jurat and Certificate of Service omitted in printing)

IN THE

COURT OF APPEALS OF KENTUCKY

F-213-69

PAUL BRANZBURG - - - - PETITIONER

VS.

J. MILES POUND, Judge, Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County Courthouse, Louisville, Kentucky - - - - - RESPONDENT

To: J. Miles Pound, Judge
Jefferson Circuit Court,
Criminal Branch, Second
Division, Jefferson County
Courthouse, Louisville, Kentucky

ORDER

This cause coming on to be heard on the petition of Paul Branzburg for an order prohibiting further proceedings by the respondent in the matter of the contempt of the aforesaid Paul Branzburg for refusing to answer questions posed to him by a grand jury sitting this date in Jefferson County, Kentucky, concerning a certain news story written

by the aforesaid Paul Branzburg and published in the Courier-Journal in Louisville, Kentucky, on November 15, 1969, and the court being sufficiently advised, it is ordered,

That you be temporarily prohibited from further action in the above-entitled matter until your response has been made and this court has had an opportunity to consider the question presented on its merits.

Heard before Judges Reed, Osborne and Milliken.

ENTERED this November 25, 1969.

/s/ James B. Milliken,
Acting Chief Justice,
Court of Appeals

RENDERED: NOVEMBER 27, 1970

COURT OF APPEALS OF KENTUCKY

PAUL BRANZBURG, - - - PETITIONER,

V. IN COURT OF APPEALS

J. MILES POUND, JUDGE, JEFFERSON CIRCUIT COURT, CRIMINAL BRANCH, SECOND DIVISION, - - RESPONDENT.

OPINION OF THE COURT BY COMMISSIONER VANCE DISMISSING PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

The petitioner, Paul Branzburg, a staff writer for the Louisville Courier Journal, produced an illustrated story entitled "The Hash They Make Isn't to Eat" which was published in the Courier Journal on November 15, 1969 and revealed how a copious quantity of marijuana was converted into the more potent drug *hashish* for which a locally profitable and ready market impliedly existed. The story

was based upon information acquired by the writer's observation during an interview granted to him upon a pledge that the identity of the two producers of *hashish* would not be revealed.

When summoned to appear before the Jefferson County Grand Jury ten days later, Branzburg refused to disclose the identity of the men, was held in contempt for his refusal, and we stayed enforcement of the contempt order until the intrinsically important legal issues presented could be given more consideration.

Marijuana (cannabis) is defined as a narcotic drug by statute, KRS 218.010(14), and unlicensed possession or compounding of such drugs is a felony punishable by both fine and imprisonment. KRS 218.210. Therefore Branzburg saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish.

KRS 421.100 provides:

> "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

The petitioner concedes in his argument before this court that the general weight of authority is that there is no constitutional guarantee of the privilege he seeks (see Judy Garland v. Marie Torre, 259 F. 2d 545, Second Circuit, Certiorari Denied, 79 S. Ct. 237 (1958)), and petitioner

submits that the only question before this court is the meaning of the words *source of any information* as used in KRS 421.100.

On behalf of the respondent, it is urged that *source of information* refers to an informant and that the statute was enacted to allow and to encourage a person having knowledge of matters which should be called to public attention to make those matters known without revealing his identity and without subjecting himself to the possibility of vengeance, retribution or public embarrassment which might be brought upon him by a revelation of his identity.

The petitioner, on the other hand, contends that *source of information* should be construed to mean all knowledge received by a newsman no matter what the source. He argues, in effect, that when a newsman observes something, the thing observed is itself the source of the information.

At the outset we observe that at common law no privilege existed in favor of communications made to newsmen. In re Goodfader, Hawaii, 367 P. 2d 472 (1961); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (1957); 58 Am. Jur., Witnesses, Section 546; 97 C.J.S., Witnesses, Section 259, See Annotation 7, ALR 3rd 591.

KRS 421.100 which grants a newsman the privilege against disclosing his *source of information* is therefore a statute in derogation of the common law. The rule that statutes in derogation of the common law should be strictly construed does not apply in Kentucky. KRS 446.080. Nevertheless some limitations by way of statutory construction have been placed upon statutes relating to privileged communications and it is elementary that a privilege which did not exist at common law cannot be asserted under a statute unless it is clear that the statute was intended to grant the privilege.

In construing KRS 421.210(4) relating to privileged communications to attorneys, the identity of one employ-

ing an attorney to return stolen merchandise was held not privileged because such employment of an attorney was not in his professional capacity. Hughes v. Meade, Ky., 453 S. W. 2d 538 (1970). Communication made to an attorney in his professional capacity was nevertheless denied privilege when the person making the communication subsequently employed another attorney and sought to maintain a fraudulent action which would have been defeated by the disclosure of the alleged privileged communication. Fidelity-Phenix Fire Ins. Co. of New York v. Hamilton, Ky., 340 S. W. 2d 218 (1960). Communications to an attorney of an intention to commit future crimes or frauds are not entitled to privilege under the statute. Cummings v. Commonwealth, 221 Ky. 301, 298 S. W. 943 (1927) and Standard Fire Ins. Co. v. Smithhart, 183 Ky. 679, 211 S. W. 441 (1919), 5 ALR 972.

It is the opinion of this court that the language of KRS 421.100 granting immunity to a newsman from disclosing the *source of any information* procured or obtained by him, grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself.

Information as used in the statute refers to the things or the matters which a reporter learns and *source* refers to the method by which or to the person from whom he learns them.

In this case the reporter learned that two men were engaged in the process of making hashish. Their identity, as well as the activity in which they were engaged, was a part of the *information* obtained by him, but their identity was not the *source* of the information.

The actual *source* of the information in this case was the reporter's personal observation. In addition some informant may have provided him with information that at a certain time and place he could observe the process of conversion of marijuana into hashish. If such was the case

we have no doubt that the identity of the informant was protected by the statute.

The reporter, however, was not asked to reveal the identity of any such informant and his privilege from making that disclosure is not in question. He was asked to disclose the identity of persons seen by him in the perpetration of a crime and he refused, urging as a justification for such refusal, that the statute should be given a broad construction extending his privilege against disclosure to all his knowledge of this incident rather than just the source of the knowledge.

The harm which ultimately might result to society from letting the reporter maintain his silence as to the identity of those seen by him in the commission of the crime in the instant case might not be earthshaking but we must consider where such a course could lead us.

Suppose a newsman or reporter should see the President of the United States or the Governor of the Commonwealth assassinated upon the street; or see a bank robbery in progress; or see a forcible rape committed. Under the construction of the statute sought by the petitioner, such a reporter could not be compelled to identify the perpetrator of the crime. We do not think the legislature ever intended such a result.

Support for the proposition that no such carte blanche privilege was intended is found in the limiting language of the statute requiring a publication of the information before any privilege attaches against disclosure of the source thereof.

In all likelihood the present case is complicated by the fact that the persons who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as *informants* cannot

be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime.

For the reasons herein given we feel that KRS 421.100 does not extend to the petitioner a privilege to refuse to answer the specific questions asked of him by the Jefferson County Grand Jury. The petition for writ of prohibition and writ of mandamus is hereby dismissed.

Milliken, Palmore, Osborne, Steinfeld and Reed concur.

Neikirk, J., not sitting.

Dissenting opinion by Hill, C.J.

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Carl C. Ousley, Jr.
First Assistant Commonwealth's Attorney
Courthouse
Louisville, Kentucky 40202

DISSENTING OPINION BY CHIEF JUSTICE EDWARD P. HILL, JR.

I respectfully dissent from the majority's opinion interpreting an act of the Legislature (KRS 421.100) that has been the law of our Commonwealth for more than thirty-four years without being heretofore questioned in the courts.

I shall not attempt to reiterate in this dissent the facts of the case but shall go right to the heart of the question. The majority opinion to my mind has adopted a strained

and unnecessarily narrow construction of the term "source of any information procured or obtained" used in KRS 421.100. I believe that the phrase "source of any information" is a broad, comprehensive one, certainly not a technical phrase.

The majority opinion stands for the proposition that the statute in question does not apply in instances in which a newspaper reporter witnesses the commission of a crime. But the statute does not place any such limitation on the privilege. It certainly would have been no trouble for the Legislature to have provided for an exception to the privilege had it thought one advisable. The statute in question is the expression of public policy by the proper branch of government, the Legislature, after nearly 150 years' experience, and this court has no business interfering with great and fundamental policy questions of our system of government.

It must be remembered that the present case does not involve injury to life, limb, or property. But even if it did, we have a situation requiring the balance of values, and I believe, as apparently did the Legislature, that the benefits to society from thoroughly and correctly reporting current events greater outweighs the probable and highly imaginary possibility of their abuse under the statute. Who ever heard of a man about to commit a crime against life, limb, or property either calling in a newspaper reporter or soliciting a newspaper reporter to witness the crime upon being assured that the reporter would not disclose what he was about to observe? Actually, the privilege provided in the statute is one which the newspaper people may weigh, and I have greater confidence in the newspaper world than to think it would participate in such an imaginary scheme or refuse to divulge important information obtained under such circumstances.

I recognize that the authorities in this country are not uniform with respect to whether newspapers have the privilege safeguarded by our statute and guaranteed by the First Amendment to the Constitution of the United States. See 47 Oregon L. Rev. 243 (1968), and 82 Harv. L. Rev. 1384 (1969). However, I am unable to find any authority from any state refusing to give such privilege a broad interpretation when a statute has been enacted by the legislature of such state safeguarding that privilege.

For an excellent summary of various newspapermen immunity statutes see D'Alemberte, "Journalists Under the Ax: Protection of Confidential Sources of Information," 6 Harv. J. Legis 307 (1969).

I conclude this dissent by quoting Re Robert L. Taylor, 412 Pa. 32, 193 A2d 181, 185, 7 ALR 3d 580, 587 (1963):

> "It is a matter of widespread common and therefore of Judicial knowledge that newspapers and news media are the principal source of news concerning daily local, State, National and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.
>
> * * * * * * *
>
> "The Act of 1937 is a wise and salutary declaration of public policy whose spiritual father is the revered

Constitutionally ordained freedom of the press. The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature *which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare* than the disclosure of the alleged crime or the alleged criminal."

I would issue the writ of prohibition sought herein.

ATTORNEYS FOR PETITIONER:

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Robert C. Ewald
Wyatt, Grafton & Sloss
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Louisville, Kentucky 40202

ATTORNEYS FOR RESPONDENT:

Edwin A. Schroering
Commonwealth's Attorney
Courthouse
Louisville, Kentucky 40202

Carl C. Ousley, Jr.
First Assistant Commonwealth's Attorney
Courthouse
Louisville, Kentucky 40202

(Title omitted in printing)

MOTION TO RECONSIDER

The petitioner, Paul Branzburg, by counsel, moves the Court to reconsider its decision and order rendered November 27, 1970, based on the Memorandum attached hereto and the decision of the United States Court of Appeals for the Ninth Circuit in *Caldwell* v. *United States,* No. 26,025,

(November 16, 1970) a copy of which is filed with this motion.

WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881

Counsel for Petitioner

(s) Edgar A. Zingman
(s) Robert C. Ewald

(Certificate of Service omitted in printing)

RENDERED: November 27, 1970

COURT OF APPEALS OF KENTUCKY

PAUL BRANZBURG - - - - PETITIONER

V. IN COURT OF APPEALS

J. MILES POUND, JUDGE, JEFFERSON CIRCUIT COURT, CRIMINAL BRANCH, SECOND DIVISION, - - RESPONDENT

OPINION OF THE COURT BY COMMISSIONER VANCE DISMISSING PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

The petitioner, Paul Branzburg, a staff writer for the Louisville Courier-Journal, produced an illustrated story entitled "The Hash They Make Isn't to Eat" which was published in the Courier-Journal on November 15, 1969, and revealed how a copious quantity of marijuana was converted into the more potent drug *hashish* for which a locally profitable and ready market impliedly existed. The story

was based upon information acquired by the writer's observation during an interview granted to him upon a pledge that the identity of the two producers of *hashish* would not be revealed.

When summoned to appear before the Jefferson County Grand Jury ten days later, Branzburg refused to disclose the identity of the men. He was ordered to reappear before the grand jury and threatened with contempt penalties if he persisted in his refusal to answer the questions propounded. We stayed further proceedings until the intrinsically important legal issues presented could be given more consideration.

Marijuana (cannabis) is defined as a narcotic drug by statute, KRS 218.010(14), and unlicensed possession or compounding of such drugs is a felony punishable by both fine and imprisonment. KRS 218.210. Therefore Branzburg saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish.

KRS 421.100 provides:

> "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

The petitioner concedes in his argument before this court that the general weight of authority is that there is no constitutional guarantee of the privilege he seeks (see

Judy Garland v. Marie Torre, 259 F. 2d 545, Second Circuit, Certiorari Denied, 79 S. Ct. 237 (1958)), and petitioner submits that the only question before this court is the meaning of the words *source of any information* as used in KRS 421.100.[1]

On behalf of the respondent, it is urged that *source of information* refers to an informant and that the statute was enacted to allow and to encourage a person having knowledge of matters which should be called to public attention to make those matters known without revealing his identity and without subjecting himself to the possibility of vengeance, retribution or public embarrassment which might be brought upon him by a revelation of his identity.

The petitioner, on the other hand, contends that *source of information* should be construed to mean all knowledge received by a newsman no matter what the source. He argues, in effect, that when a newsman observes something, the thing observed is itself the source of the information.

At the outset we observe that at common law no privilege existed in favor of communications made to newsmen. In re Goodfader, Hawaii, 367 P. 2d 472 (1961); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (1957); 58 Am. Jur., Witnesses, Section 546; 97 C.J.S., Witnesses, Section 259, See Annotation 7, ALR 3rd 591.

KRS 421.100 which grants a newsman the privilege against disclosing his *source of information* is therefore a

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[1]Petitioner raised the question of constitutional privilege and conceded that the weight of authority was that no such constitutional privilege existed in the following language:

"Although the general weight of authority seems to hold that there is no constitutional guarantee to such a privilege, there does seem to be a minority viewpoint that there is such a privilege existing under the first amendment." (Petitioner's supplemental memorandum—page 2.)

Petitioner then abandoned the claim of first amendment privilege, as follows:

"Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that ques-

(Footnote continued on following page.)

statute in derogation of the common law. The rule that statutes in derogation of the common law should be strictly construed does not apply in Kentucky. KRS 446.080. Nevertheless some limitations by way of statutory construction have been placed upon statutes relating to privileged communications and it is elementary that a privilege which did not exist at common law cannot be asserted under a statute unless it is clear that the statute was intended to grant the privilege.

In construing KRS 421.210(4) relating to privileged communications to attorneys, the identity of one employing an attorney to return stolen merchandise was held not privileged because such employment of an attorney was not in his professional capacity. Hughes v. Meade, Ky., 453 S. W. 2d 538 (1970). Communication made to an attorney in his professional capacity was nevertheless denied privilege when the person making the communication subsequently employed another attorney and sought to maintain a fraudulent action which would have been defeated by the disclosure of the alleged privileged communication. Fidelity-Phenix Fire Ins. Co. of New York v. Hamilton, Ky., 340 S. W. 2d 218 (1960). Communications to an attorney of an intention to commit future crimes or frauds are not entitled to privilege under the statute. Cummings v. Commonwealth, 221 Ky. 301, 298 S. W. 943 (1927) and Standard Fire Ins. Co. v. Smithhart, 183 Ky. 679, 211 S. W. 441 (1919), 5 ALR 972.

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tion is not before the Court in this case. The Legislature of Kentucky has settled the issue, having decided that a newsman's source of information is to be privileged. Because of this there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the Legislature has spoken. The only question before the Court is the construction of the term 'source of information' as it was intended by the Legislature.'" (Petitioner's supplemental memorandum—page 4.)

Accordingly, this opinion limits itself to the construction of the statute.

It is the opinion of this court that the language of KRS 421.100 granting immunity to a newsman from disclosing the *source of any information* procured or obtained by him, grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself.

Information as used in the statute refers to the things or the matters which a reporter learns and *source* refers to the method by which or to the person from whom he learns them.

In this case the reporter learned that two men were engaged in the process of making hashish. Their identity, as well as the activity in which they were engaged, was a part of the *information* obtained by him, but their identity was not the *source* of the information.

The actual *source* of the information in this case was the reporter's personal observation. In addition some informant may have provided him with information that at a certain time and place he could observe the process of conversion of marijuana into hashish. If such was the case we have no doubt that the identity of the informant was protected by the statute.

The reporter, however, was not asked to reveal the identity of any such informant and his privilege from making that disclosure is not in question. He was asked to disclose the identity of persons seen by him in the perpetration of a crime and he refused, urging as a justification for such refusal, that the statute should be given a broad construction extending his privilege against disclosure to all his knowledge of this incident rather than just the source of the knowledge.

The harm which ultimately might result to society from letting the reporter maintain his silence as to the identity of those seen by him in the commission of the crime in the instant case might not be earthshaking but we must consider where such a course could lead us.

Suppose a newsman or reporter should see the President of the United States or the Governor of the Commonwealth assassinated upon the street; or see a bank robbery in progress; or see a forcible rape committed. Under the construction of the statute sought by the petitioner, such a reporter could not be compelled to identify the perpetrator of the crime. We do not think the legislature ever intended such a result.

Support for the proposition that no such carte blanche privilege was intended is found in the limiting language of the statute requiring a publication of the information before any privilege attaches against disclosure of the source thereof.

In all likelihood the present case is complicated by the fact that the persons who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as *informants* cannot be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime.

For the reasons herein given we feel that KRS 421.100 does not extend to the petitioner a privilege to refuse to answer the specific questions asked of him by the Jefferson County Grand Jury. The petition for writ of prohibition and writ of mandamus is hereby dismissed.

Milliken, Palmore, Osborne, Steinfeld and Reed concur.

Neikirk, J., not sitting.

Dissenting opinion by Hill, C.J.

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MANDATE

THE COMMONWEALTH OF KENTUCKY
The Court of Appeals
Fall Term—November 27, 1970

Paul Branzburg

vs.

J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Branch—2nd Div., Louisville, Kentucky

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Appeal from a judgment of the
In Court of Appeals Circuit Court

The Court being sufficiently advised, delivered an opinion dismissing petition for writ of prohibition and writ of mandamus.

It is therefore considered that said petition be dismissed; which is ordered to be certified.

It is further considered that the appellee recover of the appellant his cost herein expended.

A copy—Attest:

DICK VERMILLION, C.C.A.
By (s) John C. Scott, D. C.

Issued January 22, 1971

(Title omitted in printing)

MOTION FOR AN ORDER STAYING THE EFFECTIVE DATE OF THE COURT'S ORDER

Pursuant to Rule 1.345 R.C.A., Petitioner Paul Branzburg, by counsel, for the reasons set forth in his Affidavit and the Memorandum filed herewith, respectfully moves the Court to stay the effective date and enforcement of its Order in the above styled actions for 90 days, to allow the Petitioner time to obtain a writ of certiorari from the Supreme Court of the United States.

WYATT, GRAFTON & SLOSS
Third Floor
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Louisville, Kentucky 40202
582-1881
Counsel for Petitioner
/s/ Edgar A. Zingman

COURT OF APPEALS OF KENTUCKY
File No. F-213-69

PAUL BRANZBURG - - - - PETITIONER

V. **ORDER**

J. MILES POUND, JUDGE, JEFFERSON CIRCUIT COURT, CRIMINAL BRANCH, SECOND DIVISION, - - RESPONDENT

The motion of the Petitioner for the court to stay for ninety days the effective date and enforcement of its order herein is denied this 25th day of January 1971.

Concurring: Judges Hill, Milliken, Palmore and Reed. Steinfeld, J., dissents.

/s/ James B. Milliken,
Chief Justice,
Court of Appeals of Kentucky

The Courier-Journal & Times, Louisville, Ky.—Sunday Morning, January 10, 1971

POT PROBLEM BYPRODUCT: DISRESPECT FOR THE LAW

By PAUL M. BRANZBURG
Courier-Journal Staff Writer

Frankfort, Ky.—Marijuana IS dangerous—in ways that few legislators, educators and public officials suspect.

Talks with a few dozen of Frankfort's pot smokers leave these impressions:

√They have less respect for the law because they consider Kentucky's criminal laws against marijuana ignorant and unfair and transfer their cynicism to laws and lawmakers in general.

√Because pot smokers feel that drug education materials used in Franklin County high schools are filled with

New analysis

distortion and propaganda, some are questioning the educational system itself.

√Pot smokers regard the statements and actions of Kentucky officials about marijuana as a combination of stupidity and cheap politics, and many have become somewhat radicalized and suspicious of government as a result.

Pot Smokers Blame Legislators

Could it be that legislators, educators and government leaders are indirectly encouraging disrespect for law, edu-

cation and government by the way in which they have handled the marijuana issue?

An oversimplification, surely. But a reasonable man could easily come to that conclusion by talking to marijuana users in Frankfort.

To appreciate the young marijuana smoker's disenchantment with the marijuana laws, one only has to raise the subject—and listen to the vehement reply.

"It is the legislators themselves who are responsible for the so-called 'marijuana problem,'" says a state employe. "They've made pot illegal on the basis of no evidence."

"It is ridiculous to put people in jail for something not known to be harmful," says another state employe. "It may be proved to be dangerous, but until it is, it is not right to put people in jail for something that may be proven to be harmless."

(Researchers around the country are now trying to determine if marijuana is physically or psychologically dangerous.)

Some students even argue that law enforcement personnel actually condone the use of hard drugs in ghetto areas.

"It's chemical warfare, man," says a Kentucky State student. "Dugee (heroin) is put in the ghetto to make people passive. I've been able to get my hands on smack (heroin) ever since I was a freshman in high school. But I couldn't go buy a bottle of alcohol. It was easier to get dope than liquor."

The young marijuana users' disenchantment with drug education is every bit as profound as their disillusionment with the law.

Although it drew praise from many—young and old—Gov. Louie B. Nunn's Louisville drug conference on Dec. 3 was a farce, the Frankfort pot smokers say.

"They showed us this stupid film in school where a guy takes one puff of marijuana and then he looks into a mirror and he sees his face turn into a werewolf," laughs a 15-year-

old Franklin County High student. "And then the teachers wonder why kids go out and smoke pot."

"At the governor's drug conference," says a freshman college student, "they were propagating all kinds of myths—like the ridiculous myth that marijuana leads inevitably to the use of heroin. When they say things like that, the kids can only laugh. Even the National Institute of Mental Health has discredited that myth."

"My idea of drug education is to read enough so that when you use dope, you won't abuse it," says another college student.

"Yeah," says a friend. "But the governor's drug conference was a completely nonobjective downer on drugs. All they would talk about is bad effects. They would never have an objective discussion of drug use. Like the pros and cons of marijuana. Like the difference between people who use drugs maturely, and those who abuse them."

Several youngsters in Franklin County say they went to the governor's conference stoned on marijuana. And they are probably telling the truth.

The Courier-Journal & Times, Louisville, Ky.—Sunday Morning, January 10, 1971

ROPE TURNS TO POT

Once an Industry, Kentucky Hemp Has Become a Drug Problem

By PAUL M. BRANZBURG
Courier-Journal Staff Writer

Frankfort, Ky.—On a lonely stretch of road on the outskirts of this city, there is an historical marker entitled "Franklin County Hemp." It tells passing motorists that hemp was once Kentucky's largest cash crop, that the gloomy buildings nearby were "the last hemp factory to operate in Kentucky, closing down in 1952."

However, the history of Franklin County hemp did not come to an end in 1952.

It is true that the stalk of Kentucky hemp is no longer used to make rope for the rigging of American sailing vessels, to make bags to hold the South's cotton. But a growing number of youths in and around Kentucky's capital city are now harvesting the plant and smoking the leaves.

The leaves are known as marijuana.

Unlawful drug use has come to the small cities of the commonwealth.

Indeed, Gov. Louie B. Nunn noted at his drug information conference, held five weeks ago in Louisville, that illegal drug use may be growing faster in small towns and rural areas than in major cities.

Based on area interviews

To find out more about this phenomenon, a reporter selected Frankfort—with a population of about 23,500—and spent two weeks interviewing several dozen drug users in the capital city. He also saw a number of them smoking marijuana.

Based on those interviews and observations, here's a look at the drug scene in Frankfort:

Within the last two years, the use of pot has become commonplace among a minority of Frankfort youth. An even smaller number are using hallucinogenic drugs (such as LSD and mescaline), amphetamines (stimulant drugs known popularly as "pep pills" or "diet pills") and barbiturates (depressant drugs commonly called "sleeping pills").

Heroin is beginning to trickle into Frankfort, although apparently few or none have become addicted.

As elsewhere in Kentucky and the nation, illegal drug use knows no age, class or racial boundaries.

Most users are in their teens and 20s, but this writer spoke to Frankfort pot smokers as young as 4 and as old as 40-plus.

The "typical" unlawful drug user in Frankfort is a middle-class high school or college student, but interviewed marijuana smokers included:

√A middle-level state government official who sold $300 worth of pot last summer and has tried LSD.

√A young Frankfort professional.

√A well-known and highly respected Frankfort resident who recently arranged a marijuana purchase within the capitol building.

√Two state government employes with jobs involving planning and testing.

"I think it's more of a problem than the average citizen thinks," Frankfort Police Chief Douglas L. True, said. "But I don't think Frankfort stands out above all the rest of the cities. It's a problem, not only in Frankfort, but everywhere."

Illegal drug use in Frankfort is far more limited than in other cities—Louisville and Lexington, for example—and there is nothing to justify hysteria.

Specifically, on the basis of interviews with Frankfort drug users, here is a conservative estimate of the scope of this city's illegal drug activity:

At Franklin County High School, with a student population of 1,622, there are 50 to 100 students who smoke marijuana at least once a month. About another 100 students have tried pot but do not use it regularly.

Of the 50 to 100 who do, 10 to 20 students use amphetamines and barbiturates when available, and about 10 use LSD when they can get it. At least two students have injected heroin at least once.

"I'm surprised," said Robert W. Hoagland, the principal, when told of these estimates. "I would have said 25 to 50 either have used or are using drugs. But that's just a guess."

Recently John Lykins, basketball coach at Franklin County High School, distributed drug use questionnaires to

students. No fewer than 157 admitted anonymously that they had "tried drugs."

Hoagland and Lykins say the reliability of the survey is in doubt because some students did not take it seriously, but Lykins estimates that "80 per cent to 90 per cent of the students were telling the truth."

"We don't think that the survey is good public relations for our school," says Lykins. "We don't want parents to think that students are using drugs left and right at Franklin County High—because it isn't so."

At Frankfort City High School, with a student body of 418, probably no more than 25 students smoke pot with any regularity. And just a handful use more potent drugs.

In a recent school-sponsored survey of students at the city high school, 57 students said they had tried pot, 83 thought it should be legalized, 23 said they had used harder drugs than pot, and 139 said they knew where to buy illegal drugs if they wanted them.

"If there are drugs in the community, there will be drugs in the school," says O. C. Leathers, Jr., the principal. "But, outwardly, I haven't been able to see any sign of it—we haven't had any discipline problems or stealing to get money."

At Kentucky State College about 90 of the 900 boarding students smoke pot regularly, according to the more conservative estimates of KSC marijuana users. And at least 300 others have tried it in the past. There is almost no amphetamine or barbiturate use among the boarding students, but about 10 will sniff heroin or cocaine when those drugs are available. A handful use mescaline and LSD, when available.

Small community of users

"If somebody came by with 50 caps (capsules) of 'dugee' (heroin), man, it would be gone in two days," said a student who is fond of "tooting" (sniffing) heroin.

"Dugee"—pronounced DO-gee—and "tooting" are Negro jargon. The corresponding lingo among white users is "smack" and "snorting.")

Frankfort also has a small community of about 30 who use drugs.

It includes "hip" people several years out of high school, a few commuting Kentucky State students, a few high school students, a few professionals (with short hair), and so on. Marijuana is the primary drug of this group, but a few use amphetamines regularly.

Although Franklin County has several hundred illegal drug users, it would be hard to characterize the situation as a "critical drug problem." This is partly because of the self-restraint and conservatism of the users themselves.

Most users limit themselves to marijuana. The typical Frankfort user is an occasional user, confining his drug intake to weekends. Nearly all avoid the use of hypodermic needles.

'Should be . . . secondary'

And even those who use amphetamines and barbiturates give every evidence of going through an "experimentation stage" in which they are eager to experience all types of drugs.

"I feel drugs should be a secondary thing," a Frankfort High student said. "The trouble with some kids is that they make it a primary thing."

Those in Frankfort most likely to make it "a primary thing" are the high school students. Some of them talk of little else but drugs. Some boast of totally fool-hardy consumption of drugs. A few are just plain reckless.

"I was doing speed (amphetamine) one night and finally I just wanted to stop speeding," a 15-year-old Franklin County High student recalled. "So I took a yellowjacket (Nembutal, a barbiturate) to come down and then I started bumping into walls."

An increasing number of Frankfort's unlawful drug users will occasionally get stoned on pot before going to school or work.

A state official recalls that "at a planning conference my supervisor presented an argument and I couldn't put together a good answer and so I realized that I had to limit my use. Now I fit it into what I want to do in terms of work production."

A freshman at the county high school admits that "sometimes I can't remember my locker combination because I'm so stoned." (Displaying the same poor judgment, he later offered this reporter a marijuana cigarette.)

Other students claim they have little difficulty going to classes stoned.

"There are some instructors who feel it is mandatory to attend their classes," a Kentucky State student said. "If their classes are bad, and you know the material, you've got to do something to bear with it.

"Either you go to class and listen to the _____, or you go stoned and concentrate on something else. You wear your shades (sunglasses) and you wear your high."

Some curious, some rebel

(A chronic marijuana smoker often has bloodshot eyes—thus the sunglasses. Researchers have found that marijuana does not dilate the pupils of the eyes, as many potheads and narcotics agents have claimed.)

A Kentucky State student from a large East Coast city said his occasional heroin sniffing has not caused him any problems, but said he knows a few students "you might call strung out (addicted)—not to the point where they get sick, but where they need it psychologically."

Why do they start using drugs?

Curiosity is a common reason for the initial experimentation.

"If a kid has any curiosity at all, he'll try the pot to see what it is like," said Dr. John Parks, a psychiatrist on the staff of the Comprehenhive (sic) Care Center in downtown Frankfort. "He isn't supposed to do these things, so he damn well will."

In the early stages of experimentation, a few may be attracted to drugs for rebellious reasons.

"You enjoy pulling the wool over your parents' eyes, over the law, and you enjoy going to school stoned and nobody has the slightest idea," said a college student who was graduated from Franklin County High. "And it is even better when you get good grades.

"But later it is no longer for rebellion. Because if rebellion is your motivation, you'll be defiant and do your damn best to talk and tell people about it—and then you'll get busted (arrested)."

Some say they smoke pot because there aren't many other forms of entertainment in Frankfort.

"It's also what's happening," said a KSC student in a room filled with marijuana smoke. "It's what people are doing. And it is much better than what students used to do—get drunk."

Among the high school students, perhaps the most important causative factor is the desire to be accepted by the group that uses drugs.

Why do they continue?

The attraction is primarily to the group, secondarily to drugs. Because it is a drug-using group, new initiates use drugs to gain acceptance.

At Franklin County High, the group tends toward longer hair, a trace of hip mannerisms, a bit of hip jargon. They regard themselves as freer spirits, less uptight, more enlightened. They label students with more traditional values "rednecks."

Once they have tried drugs, why do some continue to use it?

The pot smokers, like occasional alcohol drinkers, do it for a remarkably uncomplicted reason: they enjoy it and see nothing wrong with it. But, like a minority of alcohol drinkers, a minority of Frankfort pot smokers abuse marijuana and allow it to become overly important in their lives.

"Pot is a good experience," said a KSC student, glancing out the window of his dormitory room. "It allows me to look at things in a different perspective. Like now I'm more sensitive to sounds. You can appreciate music better with good grass. You get a feeling of well-being. With alcohol you are just out of your head, but marijuana allows you to think about things."

Marijuana is overwhelmingly the main unlawful drug used in Frankfort. The harder drugs are irregular in supply and appear to be used primarily for experimentation and occasional use.

Few in Frankfort who have used dosages of amphetamines and barbiturates (these drugs are legal when prescribed) in quantity sufficient to become high are likely to argue the virtues of these drugs. They know the dangers as well as any narcotics agent. Better, perhaps.

"I don't like speed," a 16-year-old girl at the county high

Staff Photo

(Photo omitted)

A SPOTLIGHT shines on a speaker at the recent state conference on drug abuse at Louisville's Convention Center.

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school said. "It damages your body and it isn't a good high. You get so tired, and you use the bathroom 1,000 times, and your mouth gets so dry."

The same attitude is almost universal about heroin.

"Smack is death," said a KSC student, sitting in his room—stoned on grass. "I've seen what it's all about at home."

Most of Frankfort's pot smokers have not tried hallucinogenics. Those who have are ambivalent. They talk about the ecstasies of LSD and mescaline, but they caution about the possibility of a bad trip.

Where do the drugs come from?

Most of the marijuana is picked in Franklin County and other nearby counties. The young people pick it and then give it away or sell it.

Traffic unorganized

The quality of the marijuana is poor and it cannot be sold for much—$10 an ounce at the very most.

(It may take three or more "joints" (cigarettes) of Franklin County marijuana to begin to get stoned, while one joint of good Mexican pot may get five people thoroughly stoned).

There is little organization to drug traffic in Frankfort. A college student brings some from home after Christmas vacation. A high school student picks marijuana in the fall, gives some away, sells a little.

A few students and longhairs are "dealers" only in the sense that they sell with more regularity than others. They make money at it, but probably no more than a few hundred dollars.

Some Frankfort citizens suspect that KSC students are primarily responsible for drugs in the capital city. Not so. Most of the 900 boarding students at KSC are Negro, and so these students and Frankfort have little to do with one another. Only a handful of KSC students know the longhairs downtown.

Other sources of drugs are Cincinnati, Louisville and, especially, Lexington. According to Frankfort drug users, there are student dealers at the University of Kentucky and still more dealers in the longhair community surrounding UK.

Medicine cabinet a source

A state government official said he made $300 selling marijuana last summer.

"I was just financially pressed," he said. "So I sold three pounds at about $60 each and 10 lids (ounces) at $10 each. When I saw I was getting into dealing, it made me think—'What are you getting into?' I realized it wasn't an excitement thing. I just needed the money."

Another source of drugs is the home medicine cabinet. Some youngsters simply get their pills from bottles their parents have long since forgotten.

Like "black beauties," a black amphetamine capsule whose trade name is Biphetamine. Like "red devils," a red barbiturate capsule whose trade name is Seconal.

"One guy's father had a speed prescription," said a Franklin County High student. "So he took his father's pills and used them. Then he told his father, 'Dad, those things are dangerous. I read about them. So I threw them away for you.'"

What about his own father? "My father thinks I'm an all-American Kid," he said confidently. "He doesn't suspect anything."

Frankfort's drug users are fearful about arrest, but not very much.

There have only been 11 drug arrests in Franklin County in the last year, according to state and city police.

Police 'just' react

Until recently, neither department seemed to have the manpower, specialized training or money to tangle with drug investigations.

"The Frankfort police have never raided anybody," said a Frankfort professional who smokes pot. "They don't act on things; they just react to complaints. Like if a mother calls in and complains."

"I was once in a restaurant next to Frankfort police headquarters," a state employe said. 'I was stoned and a few joints fell out of my pocket. A cop looked at them and said, 'Uh, he rolls his own cigarettes.' He didn't know."

Frankfort Police Chief Douglas L. True said one of his problems is that he has only 35 men on his force.

"And this isn't an easy matter to detect," he said. "A person who uses drugs doesn't do it publicly.

"Also, this is a rather new field for us. Police in towns this size traditionally work in other areas."

Chief True said he is pleased that the state police are organizing a narcotics squad. He predicted that this will cut down on unlawful drug use in Frankfort.

"And it grows wild around here," he said. "We used to have a hemp factory here and people used to grow it in this vicinity as a cash crop."

Some still do.

FRANKLIN CIRCUIT COURT

GRAND JURY SUBPOENA

THE COMMONWEALTH OF KENTUCKY

To the Sheriff of Jefferson County, Greeting:

You are commanded to summon Paul Branzburg, Louisville Courier Journal, Louisville, Kentucky to appear before the Grand Jury of Franklin County on the 18th day of January, 1971 at 1:00 p.m., to testify in the matter of violation of statutes concerning use and sale of drugs.

Witness JAMES E. COLLINS, Clerk of said Court, this 14th day of January, 1971.

/s/ James E. Collins, Clerk

FRANKLIN CIRCUIT COURT

IN THE MATTER OF PAUL BRANZBURG

MOTION TO QUASH GRAND JURY SUBPOENA

Comes now the Movant, Paul Branzburg, by counsel, and moves the Court that the Grand Jury subpoena issued January 14, 1971, and served upon him on January 16, 1971, be quashed and that the Movant be excused from testifying before the Franklin County Grand Jury.

As grounds for said Motion Movant states that the subpoena calls upon him "to testify in the matter of violation of statutes concerning use and sale of drugs." It would appear that this subpoena is the result of an article appearing in the Courier-Journal and Times of Louisville on Sunday morning, January 10, 1971, written by the Movant. That article dealt with the use and sale of drugs in Franklin County.

The Movant is employed as a reporter for the Courier-Journal in Louisville, Kentucky. For some time he has specialized in articles dealing with the use and sale of drugs in various locations in the Commonwealth. In order to acquire the information set forth in these articles he has gradually won the confidence and trust of those engaged in such activities or having knowledge of such activities. These confidences have enabled him to write informed and balanced stories concerning drug use which would be unavailable to most other newsmen. If Mr. Branzburg were required to disclose these confidences to the Grand Jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with those in the drug culture. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby be vitally hampered in their ability to cover the views and activities of those involved in the drug culture.

The inevitable effect of the subpoena issued to Mr. Branzburg, if it not be quashed by this Court, will be to suppress vital First Amendment freedoms of Mr. Branzburg, of the Courier-Journal, of the news media, and of those involved in the drug culture by driving a wedge of distrust and silence between the news media and the drug culture. This Court should not sanction a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring Mr. Branzburg's appearance before the Grand Jury. It is insufficient merely to protect Mr. Branzburg's right to silence after he appears before the Grand Jury. This Court should totally excuse Mr. Branzburg from responding to the subpoena and even entering the Grand Jury room. Once Mr. Branzburg is required to go behind the closed doors of the Grand Jury room, his effectiveness as a reporter in these areas is totally destroyed. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences. The sensitive news sources developed by Mr. Branzburg place no price or exaction upon their continuing relationship save confidence in the discretion of Mr. Branzburg. In the nature of things that confidence is destroyed with the closing of the doors to the Grand Jury room behind a reporter. When, in a case such as this, there is a conflict between the rights of secret interrogation of the Grand Jury and basic First Amendment rights, it becomes appropriate to inquire into the need here for the particular incursion. Clearly, the thrust here is to make the reporter an investigative arm of the police. First Amendment freedoms cannot long survive in such a role.

Recently the United States Court of Appeals for the Ninth Circuit in the case of *Earl Caldwell and New York Times Company* v. *United States of America* (November

16, 1970) (unreported as yet), dealt with a situation exactly the same as involved here. That Court held that the reporter should not be required to enter the Grand Jury room. Our own Court of Appeals of Kentucky is presently considering the application of that case to an earlier matter involving your Movant here, the case of *Paul Branzburg* v. *J. Miles Pound* (November 27, 1970, Petition for Rehearing under consideration).

Movant's rights clearly are protected under the First and Fourteenth Amendments to the Constitution of the United States, Sections 1, 2 and 8 of the Constitution of Kentucky and KRS 421.100.

Wherefore, on the basis of the First and Fourteenth Amendments to the Constitution of the United States, Sections 1, 2 and 8 of the Constitution of Kentucky and KRS 421.100, the Movant respectfully prays that this Court enter an Order quashing the subpoena in question and excusing the Movant from entering the Grand Jury room in connection with any investigation into "the matter of violation of statutes concerning use and sale of drugs."

WYATT, GRAFTON & SLOSS
Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202
/s/ Edgar A. Zingman
Counsel for Movant

FRANKLIN CIRCUIT COURT

IN THE MATTER OF PAUL BRANZBURG

ORDER

Motion denied, subject to entry of a protective order in accordance with the opinion of the Court of Appeals for the Ninth Circuit in the case of *Caldwell* v. *United States*,

such Order to be considered at 4 Pm, (sic) Friday, January 22, 1971.

/s/ Henry Meigs, Judge,
Franklin Circuit Court

Eneterd (sic) January 18, 1971

FRANKLIN CIRCUIT COURT

IN THE MATTER OF: PAUL M. BRANZBURG

PROTECTIVE ORDER

Paul M. Branzburg, Staff Writer for the Louisville Courier Journal, having been subpoenaed to testify before the January 1971 Franklin County Grand Jury, and he having, by counsel, moved to quash said subpoena, and the Court having heard arguments of counsel for Paul M. Branzburg and the Commonwealth, and the Court being advised, It Is Hereby Ordered:

1. That Paul M. Branzburg shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media.

2. That specifically, without limiting paragraph 1, Paul M. Branzburg, shall not be required to answer questions concerning statements made to him or information given to him by persons interviewed by him unless such statements or information were given to him for publication or public disclosure.

3. That, to assure the effectuation of this order, Paul M. Branzburg shall be permitted to consult with his counsel at any time he wishes during the course of his appearance before the Grand Jury.

4. That nothing in paragraphs 1, 2 and 3 of this order shall be construed to permit Paul M. Branzburg to refuse to answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by Paul M. Branzburg. In accordance with the foregoing, the Motion to Quash the Subpoena is hereby overruled.

ENTERED this 22nd day of January, 1971.

/s/ Henry Meigs,
JUDGE, Franklin Circuit Court

IN THE

COURT OF APPEALS OF KENTUCKY
ORIGINAL NO. W-29-71

PAUL BRANZBURG - - - - PETITIONER

vs.

HENRY MEIGS, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky - - - RESPONDENT

PETITION FOR TEMPORARY AND PERMANENT RESTRAINING ORDER AND WRIT OF PROHIBITION

Comes now Paul Branzburg, by counsel, pursuant to R.C.A. 1.420 and C.R. 81, and for his petition states as follows:

(1) The Respondent against whom relief is sought is the Honorable Henry Meigs, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky.

(2) The facts entitling Petitioner to relief are:

(a) Petitioner is an individual employed as a news reporter by the Courier-Journal & Louisville Times Company, a Kentucky corporation.

(b) Petitioner's duties as a reporter require Petitioner to seek out and contact sources of news information, to then write stories based upon the facts he has observed and to have such stories published in the newspapers published by his employer in Jefferson County, Kentucky for distribution and sale in Jefferson County, Kentucky, throughout the Commonwealth of Kentucky, including Franklin County, Kentucky, and in various places in the United States. Many of the facts obtained for said stories are gained solely through confidential sources of information, and, but for reliance on Petitioner's agreement to keep said sources confidential, this information would not be disclosed to the Petitioner.

(c) In the January 10, 1971, issue of the Courier-Journal and Louisville Times, there appeared a story written by Petitioner based upon information confidentially acquired concerning the use of illegal drugs and narcotics in Franklin County, Kentucky. A copy of the story is attached hereto and made a part of this petition. The information acquired for use and publication in said story was gained confidentially by Petitioner in his capacity as a newspaper reporter.

(d) On January 18, 1971, the Petitioner was subpoenaed to appear before a grand jury sitting in Franklin County, Kentucky, to be examined concerning the events and matters which became known to him in the course of his duties as a reporter.

(e) On January 18, 1971, the Petitioner appeared before the Respondent, moved that the subpoena served upon him be quashed, and moved that he be excused from appearing before the Franklin County Grand Jury. Said motions were based upon Petitioner's privilege under the First and Fourteenth Amendments to the Constitution of the United

States as interpreted by the United States Court of Appeals for the Ninth Circuit in *Caldwell* v. *United States*, No. 26,025 (Nov. 16, 1970), upon Petitioner's privilege under Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky, and upon KRS 421.100.

(f) After hearing arguments of counsel, the Respondent overruled Petitioner's motions and directed that Petitioner appear before the Grand Jury and answer the questions posed to him by the Grand Jury. Respondent further announced that in event the Grand Jury should report to the Respondent that the Petitioner had refused to answer questions, the Respondent would pursue the provisions provided for dealing with contempts of court.

(g) If Petitioner is forced to appear before the Grand Jury, or forced to disclose any information given to him in confidence, he will suffer serious and irreparable harm and damage, because his ability to procure confidential information will be severely limited or destroyed.

(3) The Respondent's action in ordering the Petitioner to appear before the Grand Jury is clearly violative of his rights and privileges as provided under KRS 421.100 and under Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky and the First and Fourteenth Amendments of the Constitution of the United States of America. It is an interference with the exercise of freedom of the press and would permit courts to destroy that confidential relationship which is essential to a free press and which has been provided for by the Legislature of the Commonwealth of Kentucky and the Constitution of the United States.

(4) The Petitioner, by counsel, respectfully prays that a writ issue from this Court requiring that:

(a) The Respondent, the Honorable Henry Meigs, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky, be restrained and prohibited from proceeding against the Petitioner in the matter of

contempt proceedings growing out of the exercise by the Petitioner under his privilege under KRS 421.100 and the Constitutions of the Commonwealth of Kentucky and of the United States of America, be ordered to sustain the Petitioner's motions to quash the subpoenas, and be ordered to excuse the Petitioner from appearing before the Grand Jury.

(b) That the entire matter be set down for hearing at a time to be set by this Court for determination upon a permanent writ against the Respondent.

(c) All other necessary and proper relief to which the Petitioner shall appear entitled.

Respectfully submitted,

Wyatt, Grafton & Sloss
300 Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881

Counsel for Petitioner

/s/ Edgar A. Zingman
/s/ Robert C. Ewald

The Affiant, Paul Branzburg, states that he has read the foregoing petition, and that the statements contained therein are true as he verily believes.

/s/ Paul M. Branzburg

(Jurat and Certificate of Service omitted in printing)

(Title omitted in printing)

AFFIDAVIT

Commonwealth of Kentucky }
} ss
County of Jefferson }

Paul M. Branzburg, being first duly sworn states as follows:

He makes this Affidavit in support of the Petition for a Writ of Prohibition in the above matter.

He is 29 years old and for the last 3½ years has been employed at the Louisville Courier-Journal. He is employed in investigative reporting as a member of a special assignment group at the newspaper.

Prior to his employment, he attended Cornell University from which he received an A.B. in 1963, the Harvard Law School from which he received a J.D. in 1966, and the Columbia University Graduate School of Journalism from which he received an M.S. Cum Laude in 1967.

Since his employment by the Louisville Courier-Journal he has written, among others, investigative stories dealing with the use of narcotics, abuse and falsification of agricultural payments, federal, state and local meat inspection programs, automobile thefts, and burglaries.

His work has been recognized on numerous occasions, including receipt of the 1968 Public Affairs Reporting Award of the American Political Science Association for a series on meat inspection; the 1970 Public Affairs Reporting Award of the American Political Science Association for a series on drug use; the 1969 Indiana Associated Press Managing Editors Award for the best feature story written in the State of Indiana that year in its classification; a Certificate of Outstanding Merit representing the I.N.G.A.A.-University of Missouri Business Journalism Award for his stories dealing with abuses under the agricultural subsidy program. He has twice been nominated

for the Pulitzer Prize based upon stories dealing with drugs and with the agricultural subsidies.

Approximately four to five weeks prior to the publication of the story dealing with drug use in Frankfort, Kentucky, he began the preparation of this story. The process of developing such a story is a complicated and tedious one. Information is obtained by moving from contact to contact. This mechanism becomes possible only to the extent that those having information develop trust and confidence in the reporter and develop a feeling of security that their identities will be protected. In the case of the Frankfort story of January 10, 1971, his original contacts led to introductions to persons active and knowledgeable in the drug culture in Frankfort. In other instances, without prior contact, he sought out persons in various locations in Frankfort and managed to develop these on his own. With the passage of time and growing confidence in these relationships, many of these led to additional contacts. The overriding determinant for development of the information was the assurance that the identity of those furnishing him information would not be disclosed. Almost uniformly, the first thing discussed would be the confidentiality of the identity of the informant. Prior to the Court of Appeals decision now under Petition for Rehearing in the case of *Branzburg* v. *J. Miles Pound*, he would show his contacts a copy of KRS 421.100 or explain the substance of the statute. Generally, this satisfied the contacts. Since the Court of Appeals decision, *supra*, much more discussion has been necessary. He has had to convince his contacts that they could rely upon him not to disclose their identities notwithstanding the Court of Appeals opinion. Once this issue is settled another issue that must be worked out is the manner of identification of the contacts in any story he might write. The descriptions used in the stories are generally the result of specific discussion and agreement with his contacts.

These descriptions are intended to protect the identity of the contact. In many instances the contacts seek assurance that if it comes to that point he will go to jail rather than to disclose their identity. In essence, the ability to obtain the information is dependent upon his ability to convince his contacts that they will not be identified through him.

Notwithstanding this, there always remains some measure of distrust upon the part of these individuals. The very fact of going behind the Grand Jury doors, therefore, would lead to suspicion upon their part and an unwillingness to cooperate further. If this Grand Jury appearance were then followed by arrests, these could lead to the possibility of a complete loss of his sources, [illegible]bility to establish future contacts and even violence. Until the identity of the actual informer was disclosed as a result of testimony at a trial of individuals indicted, he would be under a cloud of suspicion and his effectiveness and ability to operate would be destroyed. In the case of search warrants resulting in arrests and seizure of contraband, the identity of the informer might never be disclosed, which would leave him under a permanent cloud.

Since the onset of these Grand Jury proceedings and the attendant publicity resulting from them, he has already begun to experience the difficulties and the problems referred to above in connection with his investigative reporting activities in other communities. Possible contacts have in some instances refused to discuss drug use with him. In other instances they have seriously questioned whether he can offer them any protection or whether this offer of protection is worth anything in the face of the narrow legal protection granted by this Court and the likelihood that his refusal to go before the Grand Jury would produce a jailing for contempt. In the short period of time these proceedings have been pending, it has been conclusively demonstrated to him that his ability to continue to do the kind of investigative reporting which he has performed in the past has

been grievously restricted. In his judgment if this situation is not remedied by granting to reporters the privilege not to go behind the doors of the Grand Jury to testify concerning the reporter's investigative activities, the ability to provide this kind of story will be destroyed.

/s/ Paul M. Branzburg

(Jurat omitted in printing)

IN THE

COURT OF APPEALS OF KENTUCKY

W-29-71

PAUL BRANZBURG - - - - PETITIONER

V.

HENRY MEIGS, JUDGE, FRANKLIN CIRCUIT COURT - - - - RESPONDENT

ORDER DENYING PROHIBITION AND MANDATORY RELIEF

This cause is before this court on a petition for temporary and permanent orders of prohibition and a petition for mandatory relief. The petition for a temporary order of prohibition, a permanent order of prohibition and mandatory relief is denied. An opinion will follow.

ENTERED THIS 22nd DAY OF JANUARY, 1971

/s/ James B. Milliken
CHIEF JUSTICE

RENDERED: JANUARY 22, 1971

COURT OF APPEALS OF KENTUCKY

PAUL BRANZBURG - - - - - PETITIONER

v. IN COURT OF APPEALS

HENRY MEIGS, JUDGE, FRANKLIN CIRCUIT COURT, FRANKFORT, KENTUCKY - - - - - - RESPONDENT

OPINION OF THE COURT BY COMMISSIONER VANCE DENYING PETITION FOR ORDER OF PROHIBITION

The petitioner, Paul Branzburg, is a reporter for the Courier-Journal and Louisville Times Company, a publisher of newspapers in Louisville, Kentucky, with statewide circulation. On January 10, 1971, there appeared in the Courier-Journal and Louisville Times a story written by petitioner based upon information acquired by him concerning the use of illegal drugs and narcotics in Franklin County, Kentucky.

On January 18, 1971, the petitioner was subpoenaed to appear as a witness before the Franklin County grand jury to testify in the matter of violation of statutes concerning use and sale of drugs. On that same day, petitioner filed in the Franklin Circuit Court a motion to quash the grand jury subpoena and sought to be excused from appearing before the grand jury.

The motion to quash was denied and petitioner is now faced with contempt proceedings if he fails to appear before the grand jury as directed. This original action seeks an order prohibiting the judge of the Franklin Circuit Court from proceeding against the petitioner by contempt pro-

ceedings and directing said judge to sustain petitioner's motion to quash the subpoena.

Petitioner asserts that he is entitled to this relief by reason of KRS 421.100, §§ 1, 2, and 8 of the Kentucky Constitution and the First and Fourteenth Amendments of the United States Constitution.

KRS 421.100 is a statute providing in substance that no person may be compelled to reveal the source of any information procured or obtained by him and published in a newspaper or by a radio or television station with which he is connected. This statute, interpreted recently by this court in *Branzburg* v. *Pound, Judge,* Ky., ____ SW 2d ____ (1970), grants a privilege against revealing the source of a reporter's information but does not protect the information itself and does not purport to offer immunity from subpoena.

Sections 1 and 2 of the Kentucky Constitution are not directly related to freedom of the press and in the arguments before this court, the petitioner has not suggested the manner in which either of these sections affords him relief in the present situation.

Section 8 of the Kentucky Constitution provides:

> "Printing presses shall be free to every person who undertakes to examine the proceedings of the general assembly or any branch of the government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."

This section has been construed by this court in the following language:

> "By the provisions of the United States and the state constitutions guarantying [sic] the 'freedom of the press' it was simply intended to secure to the conduc-

tors of the press the same rights and immunities that are enjoyed by the public at large. The citizen has the right to speak the truth in reference to the acts of government, public officials, or individuals. The press is guaranteed the same right, but no greater right. The citizen has the right to criticise [sic] the acts of the government, provided it is with the good motive of correcting what he believes to be existing evils, and of bringing about a more efficient or honest administration of government. For like purpose and like motive he may criticise [sic] the acts of public officials; and, for the honest purpose of better subserving the public interests, he may criticise [sic] the fitness and qualifications of candidates for office, not only in respect to their ability, fidelity, and experience, but in respect to their honesty and personal habits. *The press has precisely the same rights, but no more.* (Emphasis ours.) *Riley* v. *Lee,* 88 Ky. 603, 11 SW 2d 713 (1889).[1]

The general weight of authority is that the First Amendment does not extend a privilege to a reporter's source of information. *Judy Garland* v. *Marie Torre,* 259 Fed. 2d 545 (2d Cir.) certiorari denied, 79 S. Ct. 237 (1953). The petitioner relies upon a new interpretation of the First Amendment announced in *Caldwell* v. *United States,* ____ Fed. 2d ____ (1970), a case decided by the United States Court of Appeals, ninth circuit, on November 16, 1970. In that case, Caldwell was a reporter for The New York Times who specialized in reporting news of the Black Panther Party. A federal grand jury investigating the *possibility* of Black Panther involvement in crime subpoenaed Caldwell as a witness. He moved to quash the subpoena and presented substantial evidence by affidavit from which it was

[1]This case refers to the Kentucky Constitution adopted in 1850 but Article 13, §9 of that Constitution relating to freedom of the press was for all practical purposes identical with §8 of the present Constitution.

concluded by the court that even his appearance before the grand jury would infringe the constitutional guarantees of the First Amendment in that (1) it would have a chilling effect upon and would therefore impede his ability to gather news and, (2) it would induce a form of self-censorship in that in deciding what to publish he would consider the possibilities of later subpoena.

The court held that these infringements upon First-Amendment freedom were not justified since it appeared from Caldwell's affidavit that he had no information which was not privileged by a protective order granted him by the district court judge.[2]

The posture of the case thus was that if the reporter appeared before the grand jury, First-Amendment rights would suffer and the government would gain nothing. But, on the other hand, if he were relieved of the obligation to appear, the government would lose nothing and First-Amendment rights would not suffer. A balancing of these competing rights led the court to quash the subpoena, holding, "that where it has been shown that the public's First-Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the government must respond by demonstrating a compelling need for the witness' presence before judicial processes properly can issue to require attendance."[3]

It is important to keep in mind that the issue is not the protection of the petitioner's source of information since those sources are protected by KRS 421.100. The only question here is whether, conceding the right to protect sources

[2]The district judge refused to quash the subpoena but did give Caldwell a protective order substantially similar to the protection given by KRS 421.100.

[3]We quote this language from the Caldwell opinion because of its reference to the *public's First-Amendment right to be informed*, whereas the express language of the First Amendment prohibits the enactment of any law abridging freedom of the press or freedom of speech.

of information, petitioner can be required even to appear before the grand jury?

Petitioner does not bring himself within the rule announced in *Caldwell*. Whereas Caldwell presented substantial evidence that his appearance before the grand jury would have a chilling effect upon his sources of information, the record before us contains no evidence other than petitioner's allegation that the general public, or the drug-using portion of it, would be so chilled by the mere appearance of Mr. Branzburg before a grand jury that it would cease speaking to him or furnishing information to him. The conclusion that such a chill would in fact occur is not necessary by implication for, after all, these people were speaking to him and furnishing information to him before he wrote the story in question and at that time they certainly had no assurance that he might not be required to appear at some time before a grand jury.

In the second place, a major factor in the *Caldwell* decision was an affidavit by Caldwell that he did not have any information which would not be privileged by the protective order and that his appearance before the grand jury would be an exercise in futility.

In this case, petitioner has not filed any similar affidavit and a reading of the story published by him regarding use of illegal drugs in Franklin County, Kentucky, would induce a reasonable belief of the probability that petitioner may have witnessed the commission of various crimes in Franklin County, involving either the sale, use or possession of drugs or narcotics. Thus we do not believe that petitioner is within the rule announced in *Caldwell* v. *United States*, supra.

Aside from this we have misgivings about the rule announced in *Caldwell*. It represents a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment.

The grand jury, itself a bulwark of freedom specifically recognized by the United States Constitution, is deeply embedded in the philosophy of human rights, dating back to early English law. Historically its function has been the investigation of charges of crime, but it is not an arm of the police. It is an instrument of the people, which on one hand insulates citizens from over-zealous prosecution, yet on the other hand has broad power to investigate criminal activities and other matters detrimental to the public interest.

The proceedings before a grand jury are secret and one ground of justification for secrecy is the protection that it affords to those who may be the subject of investigation on charges which prove to be without merit.

In *Blair* v. *United States,* 250 U. S. 273 (1919), it was held that attendance before grand juries in answer to subpoena is a public duty which every person is bound to perform and that the personal sacrifice involved is a part of the necessary contribution to the welfare of the public.

Any restriction upon the right of a grand jury to compel attendance of witnesses before it is a direct and obvious impediment to its functioning, but whether compulsory attendance is an infringement of First-Amendment rights is much less evident. Some day a situation may arise in which compulsory attendance before a grand jury would so seriously jeopardize constitutional rights as to require quashing the subpoena, but such a situation is not presented by the facts of this case.

The speculation that the mere appearance of a news reporter before a grand jury might jeopardize his rapport with the segment of society known as the drug culture, causing its loss of confidence in him and thereby inhibiting his ability to obtain information, is so tenuous that it does not, in the opinion of this court, present an issue of abridgement [sic] of the freedom of the press within the meaning

of that term as used in the Constitution of the United States.

The petition for order of prohibition and order directing that subpoena be quashed is denied.

All concur.

Attorneys for Petitioner:

Edgar A. Zingman, Louisville, Ky.
Wyatt, Grafton & Sloss,
(300 Marion E. Taylor Bldg.)

(Title omitted in printing)

MOTION FOR AN ORDER STAYING THE EFFECTIVE DATE OF THE COURT'S ORDER

Pursuant to Rule 1.345 R.C.A., Petitioner Paul Branzburg, by counsel, for the reasons set forth in his Affidavit and the Memorandum filed herewith, respectfully moves the Court to stay the effective date and enforcement of its Order in the above styled actions for 90 days, to allow the Petitioner time to obtain a writ of certiorari from the Supreme Court of the United States.

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582-1881

Counsel for Petitioner

/s/ Edgar A. Zingman

(Certificate of Service omitted in printing)

(Title omitted in printing)

MOTION FOR A TEMPORARY WRIT OF PROHIBITION

Petitioner, Paul Branzburg, by counsel, for the reasons set forth in his Affidavit and the Memorandum filed herewith in support of this Motion and the Motion for an Order staying the effective date and enforcement of the Court's Order, moves for a Temporary Writ of Prohibition against the Respondent, Henry Meigs, Judge, Franklin Circuit Court, to stay further action in this case to allow the Petitioner time to obtain a writ of certiorari from the Supreme Court of the United States.

Petitioner is technically without a remedy under Rule 1.345 R.C.A., in that there is no enforcement of this Court's Order from which a stay may be granted. However, inasmuch as the Rules of this Court were intended to provide relief in such a situation pending application to the Supreme Court of the United States for certiorari, Petitioner believes that a Temporary Writ of Prohibition would be an appropriate order.

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582-1881

Counsel for Petitioner
/s/ Edgar A. Zingman

(Certificate of Service omitted in printing)

COURT OF APPEALS OF KENTUCKY

File No. W-29-71

PAUL BRANZBURG - - - - PETITIONER

V. **ORDER**

HENRY MEIGS, JUDGE, FRANKLIN CIRCUIT COURT - - - RESPONDENT

In this case we have heretofore denied the extraordinary relief sought in view of the limited time the present Franklin County Grand Jury will be in session the Petitioner's motion for a temporary prohibition against the respondent, Henry Meigs, Judge of the Franklin Circuit Court, to stay further action in this case to allow Petitioner to seek certiorari from the Supreme Court of the United States is denied this 25th day of January 1971.

Concurring: Judges Hill, Milliken, Palmore, Reed and Steinfeld.

/s/ James B. Milliken
Chief Justice, Court of Appeals of Kentucky

Supreme Court of the United States

No. 1381 ---- , *October Term, 19* 70

Paul M. Branzburg,

Petitioner,

vs.

John P. Hayes, Judge, etc., et al.

ORDER ALLOWING CERTIORARI. Filed May 3, 1971.

The petition herein for a writ of certiorari to the Court of Appeals of the Commonwealth of Kentucky is granted.